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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 75-5 4

J. TONY SERRA, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. TONY SERRA, ESQ.
473 Jackson Street
San Francisco, Ca. 94111
IN PRO SE

RAY ARCHULETA, ESQ.
On The Brief

July 1, 1975

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NO.

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UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE NINTH CIRCUIT

The petitioner, J. TONY SERRA, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 24, 1975.

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OPINION BELOW

The opinion of the Court of Appeals as reported, appears in Appendix I hereto. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 24, 1975, affirming the judgment of the District Court below. A timely Petition for Rehearing En Banc was denied on May 7, 1975. On June 4, 1975, Associate Justice William J. Grannan, Jr., of the United States Supreme Court granted a Stay of the filing of the Writ of Certiorari. Thereafter this Certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

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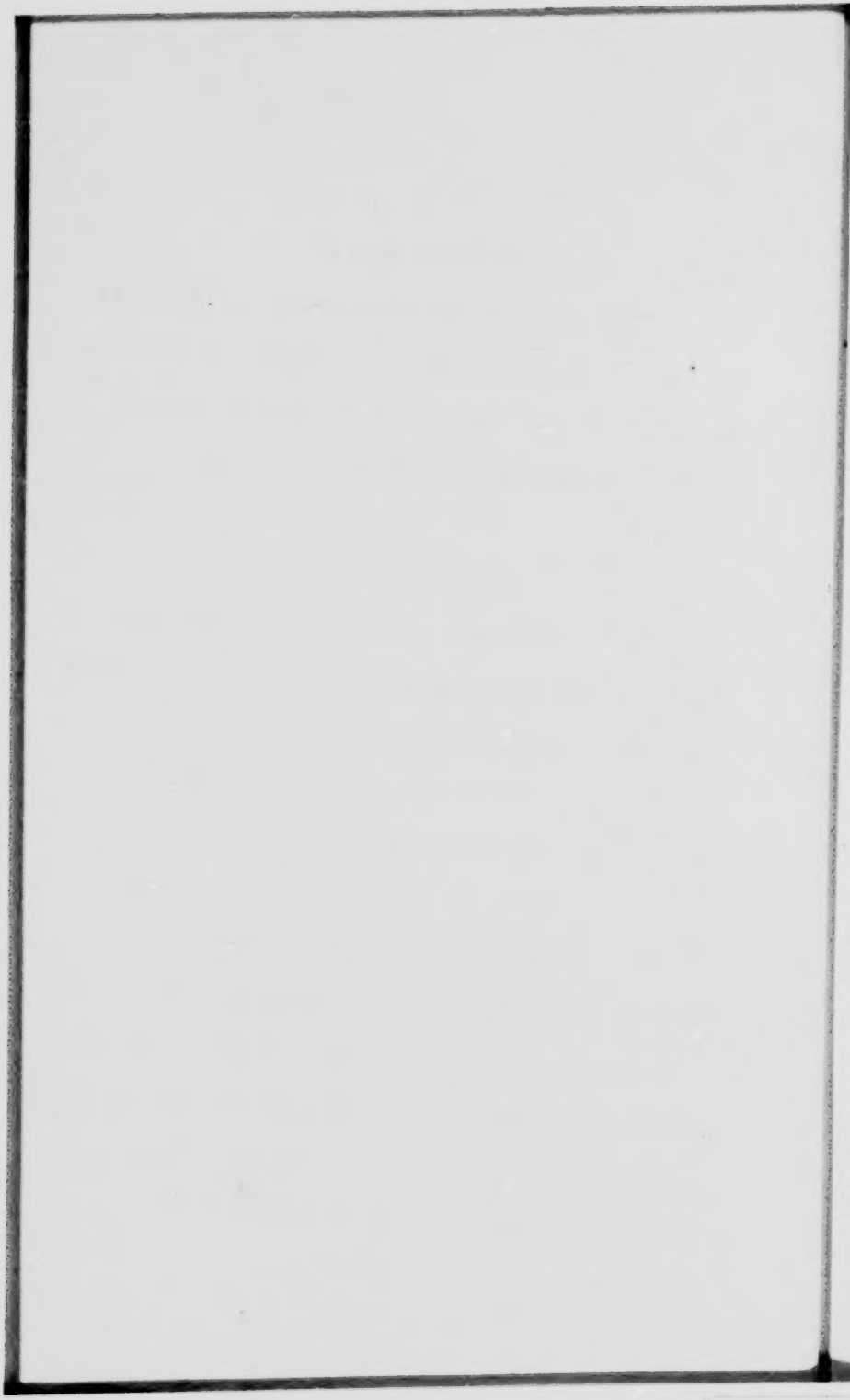

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QUESTION PRESENTED

WHETHER BISHOP V. UNITED STATES, 412 U.S. 346, 36 L.Ed. 2d 941 (1973), REQUIRES THAT INSTRUCTIONS TO THE JURY DEFINING "WILLFULNESS" EMBODY THE CONCEPT OF "BAD PURPOSE" OR "EVIL MOTIVE."

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

"Section 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or Tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or Tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

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STATEMENT OF THE CASE

Petitioner J. TONY SERRA, a practicing attorney in the State of California, was charged on February 11, 1974, in a three- (3-)Count Information, with the misdemeanor offense of having failed to file his Federal tax returns for the years 1969, 1970 and 1971. (26 U.S.C., Section 7203)

Represented at all stages of the trial proceedings In Propria Persona, and after a jury trial presided over by United States District Court Judge ALBERT C. WOLLENBERG at San Francisco, California, petitioner was acquitted of the 1969 and 1970 Counts, and was convicted upon the 1971 Count.

Petitioner was sentenced to a term of four (4) months in the custody of the

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Attorney General.[1/] He was and is at liberty upon his own recognizance, and mandate has been stayed by the Ninth Circuit Court of Appeals. [F.R. App., p. 41(b)]

At a pretrial conference[2/] conducted prior to the trial, it was determined and agreed that the sole issue to be tried was the issue of petitioner's state of mind on the three (3) dates on which the returns were due.

> "Mr. Youngquist:
> ... The third element, of course, is the state of mind and the willfulness with respect

---

1/ Petitioner has no prior record of tax violations and is still in active practice. The gross income involved in the years 1969, 1970 and 1971, is $13,472.50, $21,089.00, and $19,519.00, respectively.

2/ Record references are to the Clerk's Record (CR), one volume; and to the Reporter's Transcript (RT), one volume.

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"to his omission, and
that will be the
issue for trial ..."
(R.T., 5)

Throughout the pretrial conference it was apparent to the Court, the prosecution and to the petitioner that such was the issue in dispute:

"The Court: Your
defense is that you
--it concerns your
entire state of mind.

Mr. Serra: That's
right.

The Court: As to
what it goes to, the
good or bad purpose.

Mr. Serra: That's
absolutely right.

The Court: And
only that.

Mr. Serra: That's
right."
(R.T., 44, emphasis
added)

The Court went on to state:

"You are going to
state, as I understand

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> "it, that you did not have the bad or evil purpose that you consciously believed that you ..." (R.T., 44, emphasis added)

Thus, paramount to petitioner's defense was his state of mind as it related to the filing of his tax returns. Furthermore, that state of mind related specifically to his honest beliefs that the war in Indochina was illegal and, more importantly, that the war was being supported illegally. Numerous specific facts and events can be related to support these beliefs, e.g., failure of Congress to declare war in a situation of such magnitude and undertaking; illegal war operations in Cambodia, Laos and Thailand; material misrepresentations to the people of the United States; and so forth. (CR)

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But, regardless of whether or not these events were illegal or not, it was petitioner's defense that he honestly believed them to be illegal, and that his honest belief was the mental condition causative of his failure to file, and such failure therefore was not conceived with "bad purpose" or "evil motive." (R.T., 35) In fact, his acts in this regard were guided by, and conformed to, then-existing law as enunciated in United States v. Murdock, 290 U.S. 389 (1933), and supported by United States v. Bishop 412 U.S. 346 (1973).

The prosecution, in its opening statement, informed the jury that:

> "... state of mind, ladies and gentlemen, is something that you have to determine. And that is the difficult point in this case. It's really

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> "the only point that you are going to have to address yourselves to. And you are going to have to listen very carefully to the Court's instructions on the law as to what you can consider, what you should consider, in the way of judging what Mr. Serra's state of mind was.
>
> In other words, if, as a matter of law the facts in this case show that he willfully failed to file these returns." (R.T., 104-5, emphasis added)

Numerous other references to the sole issue to be tried in this case, viz state of mind, are made apparent by a reading of the transcript. (See R.T., 5, 6, 10, 13, 21, 31, 35, 44, 63.)

After all the parties had agreed that the sole issue to be tried was state of mind; and after discussing what the

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state of mind "goes to ..." (R.T., 44); and after having limited petitioner's defense to the sole issue of state of mind and his "beliefs" (R.T., 44, 60-64, and pointedly on page 36); the Court took away this sole defense by its refusal to instruct as requested (R.T., 65-80), and instructed as follows:

> "The only question left for your determination is whether the defendant's failure to timely file returns for each of those years was willful.
>
> The term "willfully," used in the statute, which I have read to you, means that the failure to file an income tax return was voluntary, purposeful, deliberate, and intentional, as distinguished from accidental, inadvertent or negligent.
>
> The failure to file a timely income tax return is willful if the Government proves

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> "beyond a reasonable doubt that the defendant's failure to act was with the specific intent to fail to do what he knew the law requires to be done; that is to say, with the conscious purpose of disobeying or disregarding the law which requires the defendant to file a timely return."
> (R.T., 208-9)

The instant case shows no error of commission--no alleged misrepresentation of any type--but, rather, a failure to act and, as such, state of mind is the key to any defense.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit Court of Appeals has rendered a decision in conflict with the Third, Fourth, Fifth and Eighth Circuits on the same matter, viz, the interpretation of Bishop vs.

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United States, 412 U.S. 346, 36 L.Ed 2d 941 (1973), and its definition of the instruction to be given to the jury on the meaning of the word "willful," as applied to Federal tax misdemeanors.

The rule that the word "willful" in the tax-crime felony statutes had a different meaning than in tax-crime misdemeanor statutes, had divided the Circuits until this Court's decision in Bishop v. United States (412 U.S. at 348 N.2, 36 L.Ed. 2d at 944 N.2).

Bishop declared that the, "... word 'willfully' has the same meaning in both statutes." The formulation of the requirement of willfulness is "bad faith or evil intent, ... evil motive and want of justification ..." (412 U.S. at 360, 36 L.Ed. 2d at 951). Until Congress speaks otherwise, we therefore

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shall continue to require, in both tax felonies and misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in Murdock, supra ..." (412 U.S. at 361, 36 L.Ed. 2d at 951-952).

The Ninth Circuit, in United States v. Hawk, 497 F.2d 365 (C.A. 9, 1974), cert. denied 419 U.S. 838 (1974), held that Bishop does not compel inclusion of the term "evil motive," and approved the trial Court's giving of Instructions omitting the formulation laid down in Bishop.

The Third Circuit, in United States v. Goldstein, 502 F.2d 526 (1974), submitted on Rehearing En Banc, stated at page 529:

> "One of the crucial factors which must be present to convert late filing into a criminal offense is willfulness. While

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> "this term has been generally interpreted to mean a voluntary, intentional violation of a known legal duty, the Supreme Court has emphasized that bad faith or evil motive must exist in tax cases."

The Fourth Circuit, in United States v. Snider, 502 F.2d 645 (1974), rehearing En Banc denied, the Court held that:

> "... in United States v. Bishop, 412 U.S. 346, the Supreme Court settled the question of whether the word wilfully has the same meaning in the felony statutes, 26 U.S.C., Section 7201, 7206, as it does in the misdemeanor statutes, 26 U.S.C., Section 7202-7205, 7207. It does. The Court also made it clear that it had consistently interpreted the word 'willfully' to require an element of mens rea and that 'until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors, they

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> "must be done willfully, that bad purpose or evil motive described in [United States v.] Murdock [290 U.S. 389, 398, 54 Sup.Ct. 223, 78 L.Ed. 381 (1933)] ...', 412 U.S. 361, 93 Sup.Ct. at 2017. Thus, it is no longer clear, as we would have previously thought, that the element of willfullness in a tax statute is established by proof of the voluntary, intentional violation of a known legal duty--without more."

The Fifth Circuit interprets Bishop to require, as to willful attempt, "evil motive." United States v. Tunnell, 481 F.2d 149 (5th C.A. 1973) The Court noted that certain understatements of income by the taxpayer "permits an inference of willfullness sufficient to create a jury question." (481 F.2d at 152) Obviously, the Instruction to the jury must involve the words "evil motive."

Presently before this Court is

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United States v. McCorkle, 511 F.2d 477 (7th C.A. 1974), Rehearing En Banc granted, United States v. McCorkle, 511 F. 2d 482 (7th 1975). In McCorkle (1), 511 F.2d 477, the Court held that the dictates of Bishop required the "evil motive" or "bad purpose" Instruction. McCorkle (2), 511 F.2d 482, affirmed the lower Court's conviction of the defendant. Thereafter, McCorkle filed his Writ of Certiorari before this Court.

The Eighth Circuit, in conflict with the Ninth Circuit, has stated in United States v. Bengimina, 499 F.2d 117 (1974), at 119:

> "... Bishop laid to rest any distinction between 'willful' as used in tax-felony cases, i.e., 26 U.S.C., Sections 7201 and 7206, and tax-misdemeanor cases, i.e., 26 U.S.C., Sections 7203 and 7207. Willful is to have the

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"same meaning in both
classes of cases.
Bishop, supra, at 349 ..."

2. The denial of requested jury Instructions was error where the sole issue presented was petitioner's state of mind as it applied to willfullness.

Petitioner had presented the Court with a copy of his proposed Jury Instructions (R.T., 65-80). There were five (5) Instructions requested. They were all directed at defining the mental condition of "willfullness" as including the Murdock and Bishop attributes of bad faith, evil motive and/or bad purpose. Said Instructions were denied by the Court, and the Court thereafter drafted its own Instruction (R.T., 80).

In limiting petitioner to the sole issue of state of mind, i.e.,

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petitioner's honest belief, and in refusing to give the requested Instructions, the Court took away any defense that petitioner had. Petitioner pleaded with the Court for any variation of the requested Instructions.

The Instructions, as given, led the jury to believe that petitioner's state of mind or honest belief was motive, and thereafter instructed the jury that motive was not to be considered in its deliberations (R.T., 209):

> "Nor is it a defense to the charges in the indictment (sic) that the defendant failed to file a return because he challenges or sought to challenge on constitutional, moral, or other grounds, the uses to which the government was putting his tax money."

This Instruction, coupled with the Court's own Instruction on "willfullness" (which

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is stated in pertinent part below), effectively denied petitioner a defense.

> "The failure to file a timely income tax return is willfull if the government proves beyond a reasonable doubt that the defendant's failure to act was with the specific intent to fail to do what he knew the law requires to be done; that is to say, with the conscious purpose of disobeying or disregarding the law ..." (R.T., 209, emphasis added)

By not instructing the jury as to petitioner's state of mind, i.e., whether his act was done with a "wrongful purpose," "evil motive," or was an act done without ground for believing it to be lawful (R.T., 66-67, petitioner's Proposed Instruction Number 4), the Judge took the issue of willfullness from the jury; cf. United States v. Grady (D.C.

Cir., 1973), 481 F.2d 1106, 1108. The Judge made his own determination that petitioner's act was not a result of his state of mind, after having limited him to that issue.

The crime alleged was a crime of omission, or failure to act and, as such, state of mind was the key to any defense presented by petitioner.

In the instant case, there is no question that petitioner objected to the form of the Instruction and requested that he be given "bad purpose" or "evil motive" (R.T., 79-81). The same trial Court which tried petitioner herein had been the trial Court in United States v. Klee (9th, 1974), 494 F.2d 394. In that case, the Court had given the Instruction required by Bishop, supra, and had included the terms "bad purpose and evil

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motive." (Klee, supra, at 395, fn.1)

Thus, the Instructions as given forced the jury to convict petitioner even though jury members might have believed his good-faith reasons for failing to file. In United States v. Pohlman, 510 F.2d 414 (8th 1974), the Court stated at 418:

> "... The jury must find that her failure to file arose from a bad motive and evil intent to commit an illegal act, fully aware of her obligation to do otherwise.
>
> Since bad purpose and evil motive are essential elements of willfulness under Section 7203, we see no reason that the jury should be afforded the ambiguity of an instruction which possibly denotes 3/ otherwise ..."

3/ See also, United States v. Swanson, 509 F.2d 1205 (8th, 1975)

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3. The Ninth Circuit Court of Appeals has decided a question interpreting the decision of this Court in Bishop v. United States, supra, which is in conflict with the requirements of Bishop, viz, the definition to be given to the jury of the meaning of the word "willful" as used in Instructions to the jury in Federal tax misdemeanors.

The Ninth Circuit has interpreted Bishop variously, with the decision in Hawk being inconsistent with the decisions of other panels within the Circuit.

Exercise of this Court's jurisdiction to clarify the "nagging question ... as to Justice Blackmun's reference to 'evil motive' ... (United States v. Hawk, 497 F.2d 366 [9th, 1974], cert. denied 419 U.S. 838 [1974]) would

assist in both settling the law and guiding the trial Courts.

Petitioner respectfully points to the following Ninth Circuit decisions which have cited Hawk, supra, and Klee, supra, for the proposition that the words "bad purpose" or "evil motive" need not be included in jury Instructions.[4/] The line of cases in the Ninth Circuit have all included some form of evil motive, bad purpose, or wrongful purpose. (See United States v. Klee, supra; United States v. Hawk, supra; Cooley v. United States [1974] 501 F.2d 1249, wrongful purpose; United States v. Walker [1973] 479 F.2d 407, bad purpose or without grounds for believing one's act is lawful;

4/ It should be noted that in both Hawk and Klee the Court included the words "bad purpose" or "evil motive" in its Instruction.

United States v. Gurtner [9th, 1973] 474 F.2d 297; United States v. Sullivan [1974] 369 F.Supp. 568, bad purpose; United States v. Andros [1973] 484 F.2d 531, bad purpose.)

Although it may be argued the above-cited cases are in "substantial compliance with Bishop ...," they are in compliance only insofar as they "... communicate the proper notion of specific intent in understandable terms." (Cooley v. United States, supra, citing Hawk)

The trial Court's refusal to follow Bishop and the inconsistent Instructions given by the trial Court require this Court to exercise its jurisdiction in supervising the conduct of criminal cases where, as here, the "close case" doctrine of Glasser v.

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United States, 315 U.S. 60, 67, 86 L.Ed. 2d 680, 697-698 (1942) is involved.

A defendant in a criminal trial must premise his argument to the jury upon the Court's Instructions. Bishop provided a somewhat short phraseology for willfullness--"bad purpose or evil motive." The phrase, in its entirety, is important for the explanation each adjective gives to the other, and to its explanation of all that comes before in the "standard instruction."[5/]

Bishop requires the trial Court to instruct with a phrase equally

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5/ See Devit & Blackmar, Federal Jury Practice & Instructions, Section 13.03, "knowingly," which compounds the confusion where "bad purpose or evil motive" is omitted from Sections 16.07 and 16.13 Instructions.

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descriptive if its exact words are not to be used. At the least, "... instructions must be consistent and not misleading." (Mann v. United States, 319 F.2d 404, 410 [5th, 1963])

Here, the requirement of Bishop was not met. The error is one in violation of this Court's decision in Bishop and of the rule that Instructions may not be misleading. "The fact that one instruction is correct does not cure error in giving another inconsistent one." (Mann, supra)

This Court's exercise of its supervisory power over criminal trials by a grant of Certiorari to promote a fair trial has often been determined in the past by reference to the so-called "close case doctrine" of Glasser v. United

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States, 315 U.S. 60, 67, 86 L.Ed.2d 680, 697-698 (1942).

The evidence was not overwhelming--the jury acquitted petitioner on two (2) Counts of a series of continuous conduct.

The government specifically eschewed any fraud, evasion, or atmosphere of such. The opportunity to defend the criminal charge on the merits of the key issue--state of mind--was seriously curtailed by the failure to follow Bishop's definition of willfullness.

CONCLUSION

A series of this Court's decisions have made clear that the defendant's right to a full and fair opportunity to contest the charges in the Courtroom, represented by counsel, fully prepared, will not be

curtailed.[6/] Like both the right to counsel and to full tools for cross examination, the right to argue the evidence to a jury which has had defined to it by the Court, the crucial element of willfullness in clear, unambiguous, and consistent terms, is essential to a fair trial.

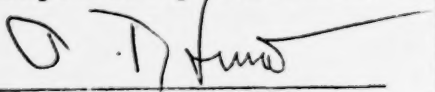
The Circuits are in conflict as to what the definition of that crucial term should be. One Circuit, the Ninth, cannot agree internally. In the case itself, the trial Court did not consistently instruct.

6/ For example, Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446 (1970); Wardius v. Oregon, 412 U.S. 470, 37 L.Ed.2d 82 (1973); Smith v. Illinois, 390 U.S. 129, 19 L.Ed.2d 956 (1968); cf. Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484 (1972).

For all the reasons heretofore,

Certiorari should be granted.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 1975, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530, Counsel for Respondent. I further certify that all parties required to be served have been served.

J. Tony Serra, Esq.
473 Jackson Street
San Francisco, Ca. 94111

IN PRO SE

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. J. TONY SERRA, *Appellant.*	No. 74-3249	ORDER AFFIRMING

[March 24, 1975]

Appeal from the United States District Court
Northern District of California

Before: KOELSCH and DUNIWAY, Circuit Judges, and TAYLOR*, District Judge

Appellant, a 40 year old lawyer, has appealed from his conviction of having wilfully and knowingly failed to timely file a federal income tax return for the year 1971 in violation of 26 U.S.C. §7203. The judgment of conviction is affirmed.

Appellant's sole reason for failing to file his tax return was because of his opposition to the involvement of the United States in the war in Southeast Asia.

The only issue here is whether the trial court committed reversible error by failing to use the terms "bad faith," "evil motive" or "bad purpose" in the jury instructions in regard to the element of wilfullness. The instructions given by the court were in substantial compliance with *United States v. Bishop*, 412 U.S. 346, 93 S.Ct. 2008 (1973). Wilfullness instructions need not include the terms "bad faith," "evil motive" or "bad purpose." See *United States v.*

*Of the District of Idaho, sitting by designation.

Hawk, 497 F.2d 365 (9th Cir. 1974), cert. denied ..... U.S. ....., 95 S.Ct. (1974); *Cooley v. United States*, 501 F.2d 1249 (9th Cir. 1974), cert. denied ..... U.S. ....., 95 S.Ct. 809 (1975); *United States v. Ducharme*, 505 F.2d 691 (9th Cir. 1974). The instructions given in this case were correct and adequate.

AFFIRMED.

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